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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 531

S. BUCHSBAUM & CO., INC.,

Petitioner,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

EDWIN J. MCDERMOTT,
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SUPREME COURT OF THE UNITED STATES

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S. BUCHSBAUM & CO., INC.,
Petitioner,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

S. Buchsbaum & Co., Inc. prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above entitled case on July 15, 1952

Opinion Below

The opinion of the Court of Claims (R. 3) is reported in 105 F. Supp. 821.

Jurisdiction

The judgment of the Court of Claims was entered July 15, 1952 (R. 6). A timely motion for rehearing was denied October 7, 1952 (R. 7). The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

Questions Presented

1. When the question is one of intention, as expressed in a letter which does not clearly indicate that it requests statutory relief, and extrinsic evidence is offered that it does not, may the issue be resolved by the Court of Claims upon a motion for summary judgment?

2. Where there are different versions as to the purpose of a claim, whether under a contract or a statute and whether the agency involved acted thereon pursuant to such statute, which versions depend for proof upon the credibility of witnesses and upon cross examination of adverse witnesses, may the issues be resolved by the Court of Claims upon a motion for summary judgment?

Statute, Regulation and Rule Provisions Involved

The pertinent portions of the statute, regulation and rule provisions involved are set forth in the Appendix, infra, pp. 16 to 19.

Statement

This action was instituted by petitioner under Section 17 (a) of the Contract Settlement Act of 1944 (58 Stat. 649) to recover the sum of $56,294.30.

Petitioner and respondent on December 7, 1944 entered into contract W33-038 ac 5950 (R. 7) for 2,677 sets of various types of tailored airplane paulins in the aggregate sum of $868,560.70. Various changes in the contract specifications were ordered by respondent only some of which had been reduced to change orders when on August 15, 1945 the contract was totally terminated by respondent for its convenience (R. 58). Petitioner on September 7, 1945 filed a request for a change order amounting to $65,381,58 to cover certain additional costs expended at respondent's directions (R. 11 to 57). A revision thereof was requested

by respondent but no action was taken thereon because of the volume of work arising from V-J day terminations (R. 75). On February 16, 1946 petitioner and respondent entered into a termination supplemental agreement (R. 57) providing for compensation for petitioner's termination costs, which contained a provision whereby petitioner released respondent from liability, except inter alia, petitioner's right to receive reimbursement for additional costs in the event respondent be found liable therefor "under appropriate procedure under Section 17a of the Contract Settlement Act and Paragraph 308-H of Procurement Regulations" (R. 60).

By letter dated April 10, 1946 petitioner submitted a "Request for Price Increase" under contract No. W33-038 ac 5950 for $65,381.58 (R. 60) and set forth the same costs as it had presented under date of September 7, 1945. By letter dated July 25, 1946 the contracting officer of the Chicago Procurement Field Office, Air Material Command, informed petitioner that the portion of petitioner's request for price increase embraced in paragraph 1 of petitioner's letter dated April 10, 1946 was considered by that office to qualify for approval under Procurement Regulation 308-H; directed petitioner to submit that portion of its request for price increase, prepared as a claim in accordance with instructions; stated that such claim would receive the Chicago Procurement Field Office's approval and be forwarded to Headquarters, Air Material Command for further action; but that the balance of the contents of the request for price increase were considered to be ineligible for approval because of lack of adequate legal consideration (R. 63). By a subsequent letter dated October 9, 1946 the contracting officer at the Chicago AAF Procurement Field Office informed petitioner that the claim for price increase under contract No. W33-038 ac

5950 was denied because there were no facts which provided adequate legal consideration for an increase in price for the articles furnished by petitioner under the contract.

Pursuant to the letter dated July 25, 1946 petitioner, by letter dated August 5, 1946, presented a request for price increase of $8,358.63 (R. 64). The contracting officer at Headquarters, Air Material Command, by letter dated August 16, 1946 (R. 67) informed petitioner that its claim for reimbursement in the amount of $8,358.63 had been forwarded for processing in accordance with Section 17 of the Contract Settlement Act of 1944 and Procurement Regulation 308-H; requested petitioner to furnish certain information in accordance with instructions which were enclosed with said letter, and stated that no further action would be taken until such information was received. Petitioner by letter dated September 7, 1946 furnished an affidavit stating its claim for reimbursement with the information required, and stated that the costs amounting to $8,358.63 were part of its request for change order filed September 7, 1945, revision of which had been requested by respondent in November, 1945, but which revision had been delayed until April 10, 1946 because of the time required for completion of termination settlements (R. 71). Under date of November 13, 1946 the parties entered into supplemental agreement providing for reimbursement to petitioner in the sum of $8,358.63 (R. 77).

On January 30, 1948, petitioner filed with Headquarters, Air Material Command its claim under Section 17a of the Contract Settlement Act of 1944 for $56,294.30 as compensation for costs it had incurred under contract No. W33-038 ac 5950 (R. 79). On May 22, 1950 the contracting agency denied petitioner's claim under Section 17a of the Contract Settlement Act of 1944 (R. 89). Pur-

suant to Section 13 of the Contract Settlement Act of 1944, petitioner on June 21, 1950 appealed to the Office of Contract Settlement Appeal Board (R. 90). The Appeal Board on December 20, 1950 dismissed petitioner's appeal on the ground that petitioner was bound by the decisions rendered by the contracting officer on July 25, 1946 and October 9, 1946 because petitioner had not appealed therefrom; that while under the evidence it was possible that petitioner had not by its letter dated April 10, 1946 made a claim under Section 17a of the Contract Settlement Act of 1944 and that it had not been denied thereunder, yet there was a burden of proof upon petitioner in appealing from the contracting officer's decision which petitioner had failed to sustain (R. 91).

Petitioner instituted this action in the Court of Claims on March 20, 1951 (R. 1). On January 16, 1952 respondent filed motion for summary judgment pursuant to Rule 51b of the Rules of the United States Court of Claims, revised May 15, 1951, basing such motion upon the documents above referred to (R. 3). On July 15, 1952 the Court of Claims granted the motion and dismissed the petition upon the ground that petitioner having on February 16, 1946 released respondent from all liability except that arising under Section 17a of the Contract Settlement Act of 1944, petitioner's request for contract price increase of April 10, 1946 must have been intended as a claim under the statute and that petitioner was bound by the contracting officer's decisions of July 25, 1946 and October 9, 1946 from which it had failed to appeal (R. 3). A timely motion for rehearing was filed by petitioner which the Court of Claims overruled on October 7, 1952 (R. 7).

Reasons for Granting Writ

1. *This case raises an important question of procedure before the Court of Claims which has not been, but should be, settled by this Court.*

The Court has had occasion to consider the impact of Rule 56 of the Federal Rules of Civil Procedure which provides for the entry of summary judgment where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[1] The Court has said, "We agree that Rule 56 should be cautiously invoked to the end that parties may always be afforded a trial where there is a bona fide dispute of fact".[2]

The Court of Claims adopted Rule 51 providing for Summary Judgment when it revised its rules on May 15, 1951 and stated in a preface to the revised rules that its Rule 51 was based upon and derived from Rule 56 of F.R.C.P.[3] Summary judgment is to be rendered if, but only if, the papers on file "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law".

This rule introduced for the first time summary judgment procedure into practice before the Court of Claims. On the whole it has had a salutory effect in making possible the prompt disposal without trial of those cases in which there is no genuine issue of fact. Undue expansion of the procedure, however carries with it grave dangers both for litigants and the court.

The importance of summary judgment procedure before

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[1] *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U. S. 620, 623 (1944); *Arenas* v. *United States*, 322 U. S. 419, 434 (1944); *Associated Press* v. *United States*, 326 U. S. 1, 6 (1945); *Kennedy* v. *Silas Mason*, 334 U. S. 249, 256 (1948); *United States* v. *Gypsum Co.*, 340 U. S. 76, 81 (1950).

[2] *Associated Press* v. *United States*, supra.

[3] 118 C. Cls. xi, xii.

the Court of Claims[4] under the Revised Rules adopted May 15, 1951 makes it desirable that the Court grant certiorari. The Court has itself given recognition to the importance of having the summary judgment procedure clearly delineated. In *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U. S. 620, 621 (1944) the Court said, "The importance of questions raised under the summary judgment rule led us to grant certiorari".

In actions in the District Courts under the Federal Rules of Civil Procedure motions for summary judgment have been granted and on appeal to the Courts of Appeal so frequently reversed and remanded because of the presence of a genuine issue as to a material fact, that it has been said, "It appears to be somewhat difficult to persuade the district courts of this; but we are satisfied that it is true".[5] and, "We take this occasion to suggest that trial judges should exercise great care in granting motions for summary judgment".[6] and "The motion for summary judgment . . . should be granted only where it is perfectly clear that no issue of fact is involved and inquiry is not desirable to clarify the law".[7] and, "Another of those all too numerous instances of the misuse of summary judgment procedure to cut a trial short".[8]

In actions before the Court of Claims litigants have not the benefit of review by the Courts of Appeals, since the Court of Claims is of the same rank and review is only obtainable on certiorari granted by the Court.[9] In normal

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[4] In the opinions rendered by the Court of Claims since May 15, 1951 and until the date of the filing of this petition for certiorari, motions for summary judgment were made in 80 cases.

[5] *Bozant* v. *Bank of New York*, 2d Cir., 1946, 156 F. 2d 787, 790.

[6] *Doehler Metal Furniture Co.* v. *United States*, 2d Cir., 1945, 149 F. 2d 130, 135.

[7] *Stevens* v. *Howard D. Johnson Co.*, 4th Cir., 1950, 181 F. 2d 390, 393.

[8] *Gray Tool Co.* v. *Humble Oil & Refining Co.*, 5th Cir., 1951, 186 F. 2d 365.

[9] 28 U. S. C. sect. 1255(1).

procedure before the Court of Claims cases are tried before a Commissioner who hears the evidence and views the witnesses and whose findings of fact and conclusions are reviewed by the Court of Claims upon briefs and arguments by the parties as if the Commissioner were the District Court and the Court of Claims were the Court of Appeals.[10] But in summary judgment procedure, involving as it does a determination of the question whether there be a genuine issue of fact, the Commissioner does not participate but the Court of Claims hears the motion. If error is committed in what is essentially a question of evidence, the determination of the existence of a genuine factual issue, then review is only by certiorari from the Court.

The care which should be exercised by the Court of Claims in acting on motions for summary judgment so as not to deprive litigants of an opportunity of presenting their side of a case is a question of such importance that review by the Court and the delineation for the Court of Claims of its summary judgment authority is required.[11]

The importance of the delineation of summary judgment procedure in the Court of Claims is realized when it is considered that it is the forum in which are brought many of the claims against the United States and that in certain respects this jurisdiction is exclusive.[12]

Summary judgment is a new and drastic remedy in the Court of Claims. It permits the Court of Claims to deny to any litigant a trial of the issues. It bars a litigant from cross-examining hostile witnesses[13] and from offering the evidence of his own witnesses.

Such tremendous power is easily abused. Summary judg-

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[10] Revised Rules of the Court of Claims adopted May 15, 1951.

[11] *Smyth* v. *United States*, 302 U. S. 319, 351 (1937); *Kennedy* v. *Silas Mason*, 334 U. S. 249, 256 (1948).

[12] 28 U. S. C. sects. 1491 to 1505; see also 28 U. S. C. sects. 1346.

[13] *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U. S. 620, 628 (1943).

ment will of course be sought by respondent in every case before the Court of Claims in which it desires to avoid trial as in this case. Trial is the protection of claimants before the Court of Claims. Unless closely supervised and safeguarded, summary judgment will be used in many cases before the Court of Claims to break down the protection offered by trial. Summary judgment lends itself well to those who seek to "make the worse appear the better cause" especially to one trying to hide facts from the searching light of trial.

The importance of summary judgment procedure under the Revised Rules of the Court of Claims adopted May 15, 1951 makes it desirable that the Court promptly and unmistakably inform bench and bar of the limits within which summary judgment may be granted.

2. *The Action of the Court of Claims in directing entry of summary judgment for respondent is inconsistent with decisions of the Courts of Appeals.*

As stated, Rule 51 of the Revised Rules of the Court of Claims, adopted May 15, 1951 is derived from Rule 56 of the Federal Rules of Civil Procedure.[14] Both rules provide for the entry of summary judgment only when "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The Court of Claims and the District Courts have concurrent jurisdiction in contract claims against the United States where the amount involved does not exceed $10,000: 28 U. S. C. sect. 1491, 28 U. S. C. sect. 1346, and the decisions of the District Courts are subject to review by the Courts of Appeals. The Court has granted certiorari to the Court of Claims because of conflict of its decisions

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[14] Supra, p. 6, note 3.

with decisions of the Courts of Appeals[15] and to the Courts of Appeals because of conflict of their decisions with decisions of the Court of Claims.[16]

In the interest of proper administration of justice there should be only one definition of a "genuine issue as to any material fact" in determining the propriety of summary judgment in both the Court of Claims and the Courts of Appeals.

This case demonstrates that the Court of Claims has granted respondent's motion for summary judgment when there are genuine issues as to material facts and its decision is in consequence inconsistent with decisions of the Courts of Appeals. To correct this inconsistency, certiorari should be granted.

In the opinion, the Court of Claims said (R. 5):

> "Defendant's motion for summary judgment is based upon the ground that plaintiff's claim of April 10, 1946, was a claim under Section 17a of the Contract Settlement Act, although not specifically designated as such, and that plaintiff is, therefore, barred from maintaining this suit under Section 13 of the Contract Settlement Act. We are of the opinion that this position of the defendant is well taken and that its motion for summary judgment must be allowed."

Petitioner contended that its claim of April 10, 1946 was not a claim under Section 17a of the Contract Settlement Act of 1944. The Court of Claims resolved this issue of fact in respondent's favor.

Certainly if petitioner had not intended by its claim of

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[15] *United States* v. *Benedict*, 338 U. S. 692, 695 (1949); *Rosenman* v. *United States*, 323 U. S. 658, 661 (1944); *United States* v. *Standard Rice Co.*, 323 U. S. 106, 107 (1944).

[16] *Colgate-Palmolive-Peet Co.* v. *United States*, 320 U. S. 420, 423 (1943); *Neuberger* v. *Commissioner*, 311 U. S. 83, 85 (1940); *Helvering* v. *Midland Mut. Life Ins. Co.*, 300 U. S. 216, 220 (1937).

April 10, 1946 to make a claim under Section 17a of the Contract Settlement Act of 1944, it could not be held to have done so, and "intention" is a question of fact which may not be ruled upon on a motion for summary judgment: *Butcher* v. *United Electric Coal Co.,* 7th Cir., 1949, 174 F. 2d 1003, 1006, where the question was whether a release was intended to cover a specific claim; *Minor* v. *Washington Terminal Co.,* D. of C. Court of Appeals, 1950, 180 F. 2d 10, 11, where the question was whether the plaintiffs knew of a grievance procedure; *Furton* v. *City of Menasha,* 7th Cir., 1945, 149 F. 2d 945, 947, where the question was whether bed rock representations in drawings amounted to warranties; *Kasper* v. *Baron,* 8th Cir., 1951, 191 F. 2d 737, 738, where it was contended that a husband and wife partnership existed, although every return to city, state, and federal government, tax or otherwise, indicated the contrary; *Fogelson* v. *American Woolen Co.,* 2d Cir., 1947, 170 F. 2d 660, 662, where the question was whether in establishing a pension plan it was the sole purpose of the board of directors to favor the president; *Hunter* v. *Mitchell,* D. of C. Court of Appeals, 1950, 180 F. 2d 763, 765 where the question was whether a reduction in force or a reorganization plan was intended; *Dewey* v. *Clarke,* D. of C. Court of Appeals, 1949, 180 F. 2d 766, 770 where the question was whether a landlord seeking possession of rented property intended to occupy it as a dwelling or to convert it into co-operative apartments; *Avrick* v. *Rockmont Envelope Co.,* 10th Cir., 1946, 155 F. 2d 568, 573: "where . . . the court is necessarily required to resolve the question of alleged intent in arriving at its judgment, we are of the opinion that justice can best be served by a trial of the question on its merits;" *Hawkins* v. *Frick-Reid Supply Corporation,* 5th Cir., 1946, 154 F. 2d 88, 89: "while the construction of a contract is ordinarily for the court,

if the terms are ambiguous, and it becomes necessary to resort to extrinsic evidence to ascertain the intent of the parties, then the issue becomes one for the jury to decide as a question of fact."

This case was before the Office of Contract Settlement Appeal Board which resolved the factual question involved against petitioner. Its opinion demonstrates that there is a genuine issue of fact: (R. 94)

> "That claim was made by letter of April 10, 1946 and was expressed to be for additional costs. The letter was not in the form required for section 17(a) claims and made no reference to that section or any regulation under it . . .
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> * * * * * * *
>
> ". . . Appellant seems to have wanted formalization of change orders that were unenforcible under the changes article of the contract because issued informally. Perhaps, to its thinking, a request to the Government to formalize the change orders as a matter of grace so that the additional costs would be payable under the changes article would not have to be considered a claim under the contract . . .
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> * * * * * * *
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> "The fact that the contracting officer required the assertion of a new claim as to the allowable portion leaves open the possibility that the original claim was not made as to either portion under Procurement Regulation 308-H . . .
>
> "We cannot, however, say that the April 10, 1946, claim was not made and denied under Section 17(a). The evidence is, at best equivocal.
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> "The burden is always on one who seeks action from a court to show that the court has jurisdiction . . . the best that appellant can do is to show that the evidence on this question is equivocal. Appellant has not therefore, sustained the burden of proof . . ."

Under this review of the evidence it must be concluded that a genuine issue as to a material fact exists. The weight of the evidence, or its credibility cannot be determined on a motion for summary judgment under the rule in the Courts of Appeals, and the burden rests upon the party making the motion: *Sarnoff* v. *Ciaglia,* 3d Cir., 1947, 165 F. 2d 167, 168; *Colby* v. *Klune,* 2d Cir., 1949, 178 F. 2d 872, 873; *Wittlin* v. *Giacalone,* D. of C. Court of Appeals, 1946, 154 F. 2d 20, 21; *Arnstein* v. *Porter,* 2d Cir., 1946, 154 F. 2d 464, 469: "Although part of plaintiff's testimony on deposition . . . does seem 'fantastic', yet plaintiff's credibility, even as to those improbabilities, should be left to the jury;" *Doehler Metal Furniture Co.* v. *United States,* 2d Cir., 1945, 149 F. 2d 130, 135; "A litigant has a right to a trial where there is the slightest doubt as to the facts, and a denial of that right is reviewable;" *Firemen's Mut. Ins. Co.* v. *Aponang Mfg. Co.,* 5th Cir., 1945, 149 F. 2d 359; 363: "Only when the evidence is such that it is clear the jury would have none to go on, though they believed that unfavorable to the movant for summary judgment, can the motion be sustained and a jury trial denied."

The Court of Claims concluded that petitioner had intended by its letter dated April 10, 1946 (R. 6) a claim under Sect. 17a of the Contract Settlement Act of 1944 because petitioner had under the release contained in the February 16, 1946 agreement (R. 57) no other rights left. But certainly there have been litigants who blindly pursued remedies denied them by prior releases,[17] and it was never contended that they did not pursue such remedies. Hence the release was not conclusive and it was error for the Court of Claims to so consider it.

Petitioner contended that Leonard A. Wells, contracting officer at Chicago AAF Procurement Field Office, who

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[17] *St. Louis, K. & S. E. R.* v. *United States,* 267 U. S. 346 (1925).

signed the letters dated July 25, 1946 (R. 63) and October 9, 1946 had no authority to act upon requests for relief under Sect. 17a of the Contract Settlement Act of 1944, because by regulation such authority was restricted to chiefs of the technical services,[18] and because the letters themselves indicated that he did not thereby exercise authority under Sect. 17a. The Office of Contract Settlement Appeal Board believed it significant that Wells stated that a new claim was required for the portion allowable under Sect. 17a. (R. 96)

The Court of Claims in entering summary judgment for respondent denied petitioner the right to cross-examine respondent's witnesses, including Leonard A. Wells, which was inconsistent with *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U. S. 620, 628 (1943) and Courts of Appeals' decisions.[19]

The Court of Claims considered of great weight the fact that petitioner's claim filed January 30, 1948 was "in all material respects the same in substance as the claim of April 10, 1946," but it ignored the allegation (R. 75) that the claim of April 10, 1946 was only a revision of the original request for price increase, dated September 7, 1945 (R. 11) to which the claim of April 10, 1946 is not only similar but almost identical, and the further allegation that it was not until August 5, 1946 that petitioner made a claim under Section 17a of the Contract Settlement Act of 1944. (R. 76) In rejecting petitioner's allegations and entering summary judgment for respondent, the decision below was inconsistent with decisions of the Courts of Appeals, since the Court of Claims chose to accept respondent's version

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[18] Appendix, p. 18.

[19] *Detsch & Co.* v. *American Products Co.*, 9th Cir., 1945, 152 F. 2d 473, 475; *Boro Hall Corporation* v. *General Motors Corporation*, 2d Cir. 1947, 164 F. 2d 770, 772; *Colby* v. *Klune*, 2d Cir., 1949, 178 F. 2d 872, 874; *Toebelman* v. *Missouri-Kansas Pipe Line Co.*, 3d Cir., 1942, 130 F. 2d 1016, 1022.

of the facts and to reject petitioner's version, which is contrary to the rule established under F. R. C. P. Rule 56: *Sarnoff* v. *Ciaglia,* 3d Cir., 1947, 165 F. 2d 167, 168; *Merchants' Indemnity Corporation of New York* v. *Peterson,* 3d Cir., 1940, 113 F. 2d 4, 5; *Begnaud* v. *White,* 6th Cir., 1948, 170 F. 2d 323, 327.

In the present case there has been no trial and the Court of Claims in granting respondent's motion for summary judgment has denied petitioner the opportunity of establishing by presentation of its evidence and by cross-examination of respondent's witnesses that its letter dated April 10, 1946 was not a claim under Sect. 17a of the Contract Settlement Act of 1944, that it was not at the time so considered by respondent, and that respondent's employee, Leonard A. Wells, had no authority under Sect. 17a of the Contract Settlement Act of 1944 to deny a claim thereunder.

The Court of Claims in entering summary judgment for respondent has placed a construction upon its Rule 51 in a manner inconsistent with the construction placed upon Rule 56 of the Federal Rules of Civil Procedure by the Courts of Appeals. To ensure the orderly administration of justice, certiorari should be granted.

Conclusion

The issue petitioner raises is important, yet so simple and clear-cut that the Court could resolve it without extended argument, or, indeed, any argument. Certiorari should be granted and the Court of Claims ordered to remand the case for trial.

Respectfully submitted,

EDWIN J. MCDERMOTT,
Counsel for Petitioner.

Appendix

Rules of the United States Court of Claims
Revised May 15, 1951

Rule 51. Summary Judgment

* * * * * * *

(b) For Defending Party: A party against whom a claim or counterclaim is asserted may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon: After a motion for summary judgment has been filed and served as provided in Rules 3 and 7 and after expiration of the time allowed by Rule 7 (b) for filing a response thereto. Such motion shall be assigned to the calendar, as provided in Rule 47(b). The judgment sought shall be rendered if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

* * * * * * *

Contract Settlement Act of 1944 (Act July 1, 1944, C. 358, Sect. 17, 58 Stat. 665, 41 U. S. C. Sect. 101-125).

41 U. S. C. Sect. 117. Defective, informal and quasi contracts.

(a) Where any person has arranged to furnish or furnished to a contracting agency or to a war contractor any materials, services, or facilities related to the prosecution of the war, without a formal contract,

relying in good faith upon the apparent authority of an officer or agent of a contracting agency, written or oral instructions, or any other request to proceed from a contracting agency, the contracting agency shall pay such person fair compensation therefor

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(c) Where a contracting agency fails to settle by agreement any claim asserted under this section, the dispute shall be subject to the provisions of Section 113 of this title.

• • • • • • •

41 U. S. C. Sect. 113.

• • • • • • •

(b) Whenever any war contractor is aggrieved by the findings of a contracting agency on his claim or part thereof or by its failure to make such findings in accordance with subsection (a) of this section, he may, at his election——

(1) Appeal to the Appeal Board in accordance with subsection (d) of this section; or

(2) Bring suit against the United States for such claim or such part thereof, in the Court of Claims or in a United States district court, in accordance with subsection (20) of section 24 of the Judicial Code (28 U. S. C. 41 (20)) • • •

(c) Any proceeding under subsection (b) of this section shall be governed by the following conditions:

• • • • • • •

(2) A war contractor may initiate proceedings in accordance with subsection (b) of this section (i) within ninety days after delivery to him of the findings by the contracting agency, • • • or (iii) in case of failure to deliver such findings, within one year after his demand therefor. If he does not initiate such proceed-

APR 17 1953
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

October Term, 1952.

No. 531.

S. BUCHSBAUM & CO., INC.,
Petitioner,

vs.

THE UNITED STATES.

Petitioner's Reply Brief

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SUPREME COURT OF THE UNITED STATES.

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PETITIONER'S REPLY BRIEF.

The arguments in the brief in opposition are not correct.

Respondent's arguments in defense of the decision below do not withstand analysis.

Respondent contends that the letter of April 10, 1946, spoke for itself and clearly indicated that statutory relief under Section 17(a) was sought. But this is not correct. Examination of the letter shows that it made no reference to Section 17(a) but was a "Request for Price Increase" (R. 60); that with it were furnished "Change Order Cost Estimate Sheets" and cost schedules, (R. 61) all of which 46 pages of attachments were identical to the attachments

to petitioner's letter of September 7, 1945 (R. 63). Examination of petitioner's letter of September 7, 1945 shows that therein petitioner asked respondent to "issue a change order" (R. 12). Under the "Changes" article of the contract a price increase was obtainable by change order (R. 8) and consequently the letter of April 10, 1946 revised the change order request of September 7, 1945 by requesting a price increase. In the affidavit of September 7, 1946 petitioner's assistant treasurer stated that after the letter of September 7, 1945 requesting the issuance of a Change Order, an audit was attempted by respondent's auditor and revision was suggested but due to the pressure to complete termination settlements, the revised request for price increase was not presented until April 10, 1946 (R. 75), and that the first claim under Section 17(a) was that made in the letter of August 5, 1946 (R. 75, 76).

Respondent lays stress upon the words "never formalized" (R. 60) and contends that the claim of January 30, 1940 was almost identical to the claim of April 10, 1946. But two words thus selected from context cannot change the fact that petitioner used them in asking for a change order, in requesting a price increase under the "Changes" article of the contract (R. 60 to 62). A comparison of the letter of April 10, 1946 (R. 60 to 62) and the claim of January 30, 1948 (R. 79 to 89) discloses, contrary to respondent's contention, that they are not almost identical but on the contrary almost entirely different. On the other hand a comparison of the letter of April 10, 1946 and the letter of September 7, 1945 (R. 11 to 57) discloses that they are in fact identical. Accordingly, respondent's contention is not correct.

Respondent apparently contends that because the Court of Claims has in other cases awarded summary judgment sparingly, it does not matter what it did in this case. But certainly the exercise of summary judgment procedure is not a matter of whim and caprice and the proper administra-

tion of justice requires that all litigants received equal justice. Hence, respondent's argument is not correct.

Respondent contends that the credibility of witnesses is not involved and that evidence would not affect the outcome of the proceedings. Yet a reading of the opinion of the Appeal Board of The Office of Contract Settlement discloses that only its rule as to burden of proof on appeal, operating to petitioner's disfavor, caused it to decide against petitioner (R. 96) and the rule adopted by the Board is the exact opposite of the rule as to burden of proof in summary judgment procedure. Thereunder, the burden of proof is upon respondent. *Sarnoff v. Ciaglia*, 3d Cir., 1947, 115 F. 2d, 167, 168.

Petitioner asks the right to cross-examine Leonard A. Wells, respondent's contracting officer, to establish thereby, as indicated by the Office of Contract Settlement Appeal Board (R. 96), that he did not consider petitioner's letter of April 10, 1946 to be a Section 17(a) claim. To deny petitioner that right, is to deny petitioner the right to offer evidence which would establish petitioner's case and this was error. *Sartor v. Arkansas Natural Gas Corp.*, 321 U. S. 620, 628. Hence respondent's argument is not correct.

Contrary to respondent's contention that petitioner cannot demonstrate any oral testimony which would alter the conclusion reached by the Court of Claims, petitioner proposes to demonstrate by oral testimony that by its letter of April 10, 1946 it sought only the same relief asked in its letter of September 7, 1945, viz. a price increase by change order, and that respondent's contracting officer did not deny petitioner's request for price increase of April 10, 1946 under Section 17(a) of the Contract Settlement Act. Petitioner has demonstrated that evidence exists whereby these points can be proved and respondent's arguments that such evidence does not exist are incorrect. Hence, there does exist a dispute over material facts.

CONCLUSION.

Certiorari should be granted and the Court of Claims ordered to remand the case for further proceedings.

Respectfully submitted,

EDWIN J. McDERMOTT,
Counsel for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 531

S. BUCHSBAUM & CO., INC., PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 3) is reported at 105 F. Supp. 821.

JURISDICTION

The judgment of the Court of Claims was entered July 15, 1952 (R. 6). A timely motion for rehearing was denied October 7, 1952 (R. 7). The jurisdiction of this Court is invoked under 28 U.S.C. 1255 (1).

QUESTION PRESENTED

Whether the Court of Claims may enter summary judgment in favor of defendant under Rule 51 of that court when the only question is whether a written document constituted a claim under Section 17(a) of the Contract Settlement Act, although not specifically designated as such.

RULE AND STATUTES INVOLVED

Court of Claims Rule 51. Summary Judgment

* * * * *

(b) For Defending Party: A party against whom a claim or counterclaim is asserted may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceeding Thereon: After a motion for summary judgment has been filed and served as provided in Rules 3 and 7 and after expiration of the time allowed by Rule 7(b) for filing a response thereto, such motion shall be assigned to the calendar, as provided in Rule 47(b). The judgment sought shall be rendered if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

* * * * *

The Contract Settlement Act of 1944 (Act of July 1, 1944, c. 358, Secs. 13, 17, 58 Stat. 649, 41 U.S.C. Sec. 101-125) provides in pertinent part:

Sec. 13.

* * * * *

(b) Whenever any war contractor is aggrieved by the findings of a contracting agency on his claim or part thereof or by its failure to make such findings in accordance with subsection (a) of this section, he may, at his election—

(1) appeal to the Appeal Board in accordance with subsection (d) of this section; or

(2) bring suit against the United States for such claim or such part thereof, in the Court of Claims or in a United States district court, in accordance with subsection (20) of section 24 of the Judicial Code (28 U.S.C. 41 (20) * * *.

(c) Any proceeding under subsection (b) of this section shall be governed by the following conditions:

* * * * *

(2) A war contractor may initiate proceedings in accordance with subsection (b) of this section (i) within ninety days after delivery to him of the findings by the contracting agency, * * * or (iii) in case of failure to deliver such findings, within one year after his demand therefor. If he does not initiate such proceedings within the time specified, he shall be precluded thereafter from initiating any proceedings in accordance with subsection (b) of

this section, and the findings of the contracting agency shall be final and conclusive, or if no findings were made, he shall be deemed to have waived such termination claim.

Sec. 17. Defective, informal and quasi contracts.

(a) Where any person has arranged to furnish or furnished to a contracting agency or to a war contractor any materials, services, or facilities related to the prosecution of the war, without a formal contract, relying in good faith upon the apparent authority of an officer or agent of a contracting agency, written or oral instructions, or any other request to proceed from a contracting agency, the contracting agency shall pay such person fair compensation therefor.

* * * * *

(c) Where a contracting agency fails to settle by agreement any claim asserted under this section, the dispute shall be subject to the provisions of section 13 of this Act.

STATEMENT

On December 18, 1944, petitioner entered into a contract with the War Department for the manufacture of airplane tailored paulins. This contract was terminated for the convenience of the Government on August 15, 1945. On February 16, 1946, petitioner and respondent entered into Supplemental Agreement No. 5 (R. 4-5), an agreement for the consolidated settlement and termination of petitioner's contracts and change orders. Petitioner

agreed that the payment of the balance therein specified constituted payment "in full and complete settlement of the amount due the Contractor by reason of the complete termination of work under the Contracts, and of all other claims of the Contractor under the Contracts and under the Act, insofar as it pertains to the Contracts, except as hereinafter provided in Article 5 hereof." Article 5 of the contract provided in pertinent part:

> Article 5. Upon the payment of the sums payable under Article 4 hereof, all rights and liabilities of the parties under the Contract(s) and under the Act, insofar as it pertains to the Contract(s), shall cease forthwith and be forever released, except:
>
> * * * * *
>
> (8) The right of the Contractor to receive from the Government any sums of money for reimbursement for additional costs incurred as a result of CCN No. 3 (N-33582) and CCN No. 4 (N-34793) to the Contract No. W 33-038-ac-5950, which CCNs were never formalized, in the event the Government is found liable for said costs under appropriate procedure under Section 17a of the Contract Settlement Act and Paragraph 308-H of Procurement Regulations.

Accordingly, the only rights reserved by the petitioner were those which came under section 17(a) and the implementing paragraph (308-H) of the Procurement Regulations (R. 59-60).

On April 10, 1946, petitioner submitted to the Commanding General at Dayton, Ohio, a written claim denominated "Request for Price Increase", amounting to $65,381.38. To this claim was attached a number of letters and schedules, including petitioner's original bid on the contract in suit (R. 60-63).

On July 25, 1946, the contracting officer issued a written decision that a portion of petitioner's claim qualified for approval under Procurement Regulation 308-H (R. 63-64). The balance of the claim was denied. On October 9, 1946, the contracting officer formally decided the claim of April 10, 1946, approving a part thereof in the amount of $8,053.53 and denying the balance. Petitioner did not appeal from this decision.

On January 30, 1948, petitioner filed with the contracting officer a written request dated January 19, 1948, conforming closely to the disallowed portion of the claim of April 10, 1946, and specifically stating that it was made under Section 17(a) of the Contract Settlement Act. On May 22, 1950, the contracting officer denied this claim. On June 21, 1950, petitioner appealed from the adverse decision to the Appeal Board of the Office of Contract Settlement. On motion of respondent the Appeal Board dismissed the appeal as untimely. Thereafter, on March 20, 1951, suit was brought in the Court of Claims under Section 17(a) of the Contract Settlement Act (41 U.S.C. 117(a), 58 Stat. 665).

Respondent's motion for summary judgment[1] was granted by the Court of Claims on the ground that the claim of April 10, 1946, was a claim under Section 17(a) of the Contract Settlement Act and that petitioner "did not appeal from the decision of the contracting officer, or bring suit within the time required by Section 13 of the Contract Settlement Act" (R. 6)

ARGUMENT

The determination by the Court of Claims, for the purpose of its summary judgment procedure, that there was no genuine issue as to whether a particular letter, *i.e.*, the letter of April 10, 1946, sought relief under Section 17(a) of the Contract Settlement Act does not present a matter of general importance.

Under Section 13(b) of the Contract Settlement Act of 1944 (41 U. S. C. 113(b), 58 Stat. 649, 661) a contractor has the options of appealing from the findings of the contracting agency to the Appeal Board, of bringing suit in the Court of Claims, or of bringing suit in the Court of Claims in the event he is aggrieved by the findings of the Appeal Board. See also Section 13(d)(2) of the Contract Settlement Act, 41 U. S. C. 113(d)(2). Petitioner, therefore, had to appeal either to the Appeal Board or the Court of Claims within ninety days of the delivery of the findings of the contracting agency, failing which such findings became conclusive

[1] The motion was made on the petition, the memorandum of pre-trial conference, and the exhibits filed at the pre-trial conference (R. 3).

(Section 13(c)(2) of the Contract Settlement Act). Petitioner does not dispute the holding that if the claim filed on April 10, 1946 (R. 60-63) was under Section 17(a) of the Contract Settlement Act and Paragraph 308-H of the Procurement Regulations, the Appeal Board properly dismissed the appeal filed with it on June 21, 1950, as untimely and the suit in the Court of Claim was barred.

Petitioner, which took advantage of the partial allowance of the claim it presented on April 10, 1946, fails to specify wherein any error was committed, or to tender any hypothesis as to what the claim might conceivably have been if it was not a Section 17(a) claim based on an informal contract. The letter of April 10, 1946, spoke for itself and clearly indicated that statutory relief under that section was sought. Extrinsic evidence could not contradict what the letter established beyond doubt. The letter could only have been intended to come within the exception to the release contained in the termination supplemental agreement of February 16, 1946;[2] its statement that "The actual CCN-3 was *never formalized*" (R. 60) is explicable only as a request for a price increase under Section 17[3] which fell within the exception to the release; the letter was so understood and acted on by the War

[2] The exception covered reimbursement for additional costs in the event the Government might be liable therefor under Section 17(a) of the Contract Settlement Act and Paragraph 308-H of Procurement Regulations.

[3] Petitioner lamely argues that the letter in the light of the release need not have been a claim under Section 17 because "there have been litigants who blindly pursued remedies denied them by prior releases" (Pet. 13).

Department, which said that a portion qualified for approval under Procurement Regulation 308-H; and petitioner accepted payment of the partial allowance on that understanding.[4] Moreover, the claim made almost two years later which was designated as a Section 17(a) claim, was almost identical to the claim of April 10, 1946.

As the case involves nothing more than the application of generally accepted principles to a particular set of facts, so there is no occasion to review the use of the summary judgment procedure by the Court of Claims.

The principles governing the allowance of motions for summary judgment have been fully developed and are no longer in doubt.[5] Rule 51 of the Court of Claims is modeled on Rule 56 of the Federal Rules of Civil Procedure. Rules of the Court of Claims, 118 C. Cls. xi, xii. The decisions of the Court of Claims disclose that it awards summary judgment sparingly, in accord with the limitations generally accepted in the federal courts. *Florida Dehydration Co.* v. *United States,* 101 F. Supp. 361 (C. Cls.); *Love* v. *United States,* 122 C. Cls. 144, 151; *Hadden* v. *United States,* 105 F. Supp. 1010,

[4] If petitioner had not understood that its claim was properly disallowed, it would not have then split its claim, but would have filed in proper form both the allowed and disallowed portion.

[5] The recent literature is copious. See, *e.g.*, 3 Moore, *Federal Practice*, pp. 3171, *et seq.*; Yankwich, *Summary Judgment under Federal Practice*, 40 Calif. Law Rev. 204 (June 1952); Clark, *The Summary Judgment*, 36 Minn. L. Rev. 567 (May 1952); McDonald, *Summary Judgments*, 30 Texas L. Rev. 285 (January 1952); 48 Columbia L. Rev. 780 (July 1948); 99 Univ. Pa. L. Rev. 212 (November 1950); 55 Yale L.J. 810 (June 1946).

1017 (C. Cls.); *Garcia* v. *United States*, 108 F. Supp. 608, 613 (C. Cls.); *Palace Corporation* v. *United States*, C. Cls. No. 49471, decided March 3, 1953. This is an ordinary case without unusual features, which involves no question of the credibility of witnesses or of "trial by affidavit." *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U. S. 620; *Colby* v. *Klune*, 178 F. 2d 872 (C.A. 2); *Arnstein* v. *Porter*, 154 F. 2d 464 (C.A. 2); *Toebelman* v. *Missouri-Kansas Pipe Line Co.*, 130 F. 2d 1016, 1022 (C.A. 3); *Whitaker* v. *Coleman*, 115 F. 2d 305, 306 (C.A. 5). Since on the facts of this case evidence would not affect the outcome of the proceedings (*United States* v. *Gypsum Co.*, 340 U. S. 76, 85; *Broderick Wood Products Co.* v. *United States*, 195 F. 2d 433, 438-9 (C.A. 10)), and the courts of appeals would sustain judgments for defendants entered on the supporting documents pursuant to Rule 56, F. R. C. P., it does not avail petitioner to assert conflict with general cautionary expressions in the opinions. Cf. *Associated Press* v. *United States*, 326 U. S. 1, 6.

In sum, this case presents merely a routine application of the summary judgment procedure. As a documentary case, it is not on the borderline. Cf. *Fogarty* v. *United States*, 340 U. S. 8. By the strictest standards the motion would have been granted on the strength of what petitioner's letter of April 10, 1946, examined in context, admitted.*

* "• • • where the movant's case is established by official records and documents, a failure to impeach such evidence indicates the absence of any issue warranting a full trial." Note, *Factors Affecting the Grant or Denial of Summary Judgment*, 48 Columbia L. Rev. 780, 782 (July 1948).

The Court of Claims, after the pretrial conference and at the time it passed on the motion for summary judgment, was in possession of all the pertinent data it could have after a trial. See *Fee* v. *Johnson & Wimsatt*, 127 F. 2d 729, 737 (C. A. (D. C.); *Tripp* v. *May*, 189 F. 2d 198 (C.A. 7). And petitioner cannot demonstrate any oral testimony it could adduce which would in any way alter or affect the conclusion reached by the Court of Claims. Cf. *Radio City Music Hall Corp.* v. *United States*, 135 F. 2d 715, 718 (C.A. 2); *Engl* v. *Aetna Life Ins. Co.*, 139 F. 2d 469, 473 (C.A. 2).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1953.